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DEPARTMENT OF COMMERCE

International Trade Administration

[C-570-968]

Aluminum Extrusions From the People's Republic of China: Notice of Court Decision Not in Harmony With Final Affirmative Countervailing Duty Determination and Notice of Amended Final Affirmative Countervailing Duty Determination

AGENCY: Import Administration, International Trade Administration, Department of Commerce

SUMMARY: On November 30, 2012, the United States Court of International Trade (CIT) sustained the Department of Commerce's (Department's) results of redetermination, which recalculated the all others subsidy rate in the countervailing duty (CVD) investigation of aluminum extrusions from the People's Republic of China (PRC)¹ pursuant to the CIT's remand order in MacLean Fogg IV.² Consistent with the decision of the United States Court of Appeals for the Federal Circuit (CAFC) in Timken,³ as clarified by Diamond Sawblades,⁴ the Department is notifying the public that the final judgment in this case is not in harmony with the Department's Final Determination and is therefore amending its Final Determination.

EFFECTIVE DATE: December 10, 2012

FOR FURTHER INFORMATION CONTACT: Robert Copyak, AD/CVD Operations, Office 8, Import Administration, U.S. Department of Commerce, C129, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: 202-482-2209.

SUPPLEMENTARY INFORMATION: On April 4, 2011, the Department issued the Final

¹ See Aluminum Extrusions From the People's Republic of China: Final Affirmative Countervailing Duty Determination, 76 FR 18521 (April 4, 2011) (Final Determination).

² See MacLean Fogg Co., et al. v. United States, Slip Op. 12-146, Court No. 11-00209 (November 30, 2012) (MacLean Fogg IV).

³ See Timken Co. v. United States, 893 F.2d 337 (Fed. Cir. 1990) (Timken).

⁴ See Diamond Sawblades Mfrs. Coalition v. United States, 626 F.3d 1374 (Fed. Cir. 2010) (Diamond Sawblades).

Determination. In the Final Determination, the Department assigned a total adverse facts available (AFA) rate of 374.14 percent to the three non-cooperating mandatory respondents and calculated company-specific net subsidy rates for two participating voluntary respondents. Pursuant to the statute and regulations, the Department averaged the rates calculated for the mandatory respondents and applied this rate as the all-others rate.⁵

In MacLean Fogg I, the CIT held that the statute was ambiguous concerning whether the Department is required to base the all-others rate on rates calculated for mandatory respondents and therefore the Department was permitted to use the mandatory respondent's rate in calculating the all-others rate, provided it did so in a reasonable manner.⁶ Nonetheless, the CIT remanded the all-others rate to the Department for reconsideration because the Department had failed to articulate a logical connection between the mandatory respondent rates, based on AFA, and the all-others companies.⁷

In MacLean Fogg II, the CIT held that the Department's preliminary all-others rate in the Preliminary Determination⁸ was also subject to review under the same reasonableness standard because it had legal effect on the entries made during the interim time period between the issuance of the preliminary and final CVD rates, both as a cash deposit rate and, if an annual review was sought, as a cap on the final rate for those particular entries.⁹ Thus, in MacLean-Fogg II, the Court held that it would consider the reasonableness of the preliminary rate when it reviews Commerce's remand determination.¹⁰

In MacLean Fogg III, the Court considered the Department's first remand results in

⁵ See Final Determination, 76 FR at 18523, and accompanying Issues and Decision Memorandum (I&D Memorandum) at Comment 9.

⁶ See MacLean-Fogg Co. v. United States, 836 F. Supp. 2d 1367, 1373-1374 (CIT 2012) (MacLean-Fogg I).

⁷ Id. at 1376.

⁸ See Aluminum Extrusions From the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination, 75 FR 54302 (September 7, 2010) (Preliminary Determination).

⁹ See MacLean-Fogg Co. v. United States, 853 F. Supp. 2d 1253, 1256 (2012) (MacLean-Fogg II).

¹⁰ Id.

which the Department did not recalculate the all-others rate, but rather, provided data indicating that the rate calculated for the mandatory respondents is logically connected to the all-others companies because the mandatory respondents comprise a significant portion of the Chinese extruded aluminum producers and exporters and thus are representative of the Chinese extruded aluminum industry as a whole.¹¹ The CIT held that “nothing in the statute requires that the mandatory respondents’ rates, even when based on AFA, may only be used to develop rates for uncooperative respondents.”¹² However, in MacLean Fogg III, the CIT also concluded that the Department failed to explain how the all-others rate was remedial and not punitive when it assumed use of all subsidy programs identified in the investigation.¹³ Therefore, the CIT remanded for the Department’s consideration of the issue.¹⁴

In its final results of redetermination pursuant to MacLean Fogg III, the Department designated the all-others rate as equal to the preliminary rate it calculated for the mandatory respondents: 137.65 percent ad valorem.¹⁵ In MacLean Fogg IV, the CIT affirmed the Department’s final results of redetermination pursuant to remand, holding that the Department’s selection of this all-others rate is reasonable.¹⁶

¹¹ See MacLean-Fogg Co. v. United States, 853 F. Supp. 2d 1336, 1338 (2012) (MacLean-Fogg III).

¹² Id. at 1341.

¹³ Id. at 1342 – 1343.

¹⁴ Id. at 1343.

¹⁵ See “Final Results of Redetermination Pursuant to Court Remand,” dated September 13, 2012.

¹⁶ See MacLean Fogg IV at 11-12. The Court also held that the preliminary all-others rate, at issue in MacLean Fogg II, is reasonable, and sustained this rate. Id. at 12.

Timken Notice

In its decision in Timken¹⁷ as clarified by Diamond Sawblades, the CAFC has held that, pursuant to section 516A(e) of the Tariff Act of 1930, as amended (the Act), the Department must publish a notice of a court decision that is not “in harmony” with a Department determination and must suspend liquidation of entries pending a “conclusive” court decision. The CIT's November 30, 2012, judgment in MacLean Fogg IV sustaining the Department’s decision to designate the all others rate as equal to the preliminary rate it calculated for the mandatory respondents (137.65 percent ad valorem), constitutes a final decision of that court that is not in harmony with the Department’s Final Determination. This notice is published in fulfillment of the publication requirements of Timken.

Amended Final Determination

Because there is now a final court decision with respect to the Final Determination, the Department amends its Final Determination. The Department finds the following revised net subsidy rate exists:

Company	<u>Ad Valorem</u> Net Subsidy Rate
All Others Rate	137.65 percent <u>ad valorem</u>

¹⁷ See Timken, 893 F.2d at 341.

For companies subject to the all others rate, the cash deposit rate will be the rate listed above and the Department will instruct U.S. Customs and Border Protection accordingly. This notice is issued and published in accordance with sections 516A(e)(1), 751(a)(1), and 777(i)(1) of the Act.

Paul Piquado
Assistant Secretary
for Import Administration

_December 6, 2012_____

Date

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